12:59PM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STEPHEN KERSHNAR,

Plaintiff,

Case No. 1:23-CV-525 (LJV)

vs.

August 11, 2023

STEPHEN H. KOLISON, JR., in his individual capacity and his official capacity as the President of the State University of New York at Fredonia, and

DAVID STARRETT, in his individual capacity and official capacity as Executive Vice President and Provost of the State University of New York at Fredonia,

Defendants.

TRANSCRIPT OF ORAL ARGUMENT re PRELIMINARY INJUNCTION MOTION
BEFORE THE HONORABLE LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PRESENT: **KRISTIN KLEIN WHEATON, ESQ.**
State University of New York
Via Teleconference

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01:00PM (Proceedings commenced at 1:00 p.m.)

01:00PM THE CLERK: All rise. United States District Court for the Western District of New York is now in session, the Honorable Lawrence J. Vilardo presiding.

01:00PM THE COURT: Please be seated.

01:00PM THE CLERK: 23-CV-525, Kershnar versus Kolison, et al. Counsel for the plaintiff, please state your name for the record.

01:01PM MR. COVERT: Good afternoon, Your Honor. Barry Covert on behalf of Mr. Kershnar, who is present in the courtroom. He's in the first row behind me, immediately.

I'd also like to introduce the Court to Robert Corn-Revere. We filed a pro hac motion for his appearance today.

And the Court has met Adam Steinbaugh, also cocounsel, at the last appearance.

Your Honor we are going to accept the Court's invitation to have inexperienced counsel argue a case. Mr. Steinbaugh will be conducting the primary oral argument. This will be his first federal court argument of any substance, and he's very much looking for to it.

And then Mr. Corn-Revere will be handling any rebuttal arguments afterwards.

So the Court will be absolved of having to listen to me any further beyond this introduction.

01:02PM THE COURT: You've done a wonderful job so far. So, I take it Mr. Corn-Revere, is that the way it's pronounced?

MR. COVERT: Yes.

THE COURT: Is not yet admitted to practice in this Court.

MR. COVERT: I don't believe so. We did file the pro hac motion, but I was informed that it was being -- that the approval was being docketed, I believe, when I came in

here. But I did not see any objection.

THE COURT: Let me just -- any objection to him arguing --

MS. PANTZER: No, Your Honor.

THE COURT: -- pending his admission?

MS. PANTZER: No, Your Honor.

THE COURT: Terrific. Great. That's not a problem. That's not a problem.

MR. COVERT: Thank you, Your Honor.

THE COURT: Yeah, I don't stand on principle for things like that. I assume he will be admitted in due course, and it hasn't been done yet, but there's no reason to delay things.

MR. COVERT: Thank you.

THE COURT: Okay. Great. Thank you very much. I appreciate that.

THE CLERK: Counsel for the defendants, please state your name for the record.

MS. PANTZER: Your Honor, my name is Alyssa Jordan Pantzer. I'm an Assistant Attorney General with the New York State Office of the Attorney General.

MS. KIMURA: Jennifer Metzger Kimura, Assistant Attorney General on behalf of the defendant.

MR. BOYD: Good afternoon, Your Honor, Christopher Boyd, Deputy Assistant Attorney General in charge. Like

01:03PM Mr. Covert, I'm not going to be speaking any more after this, hopefully.

THE COURT: Okay. Well, you've done a good job, too.

MR. BOYD: Thank you, Your Honor.

THE COURT: So you can both go back and, you know, take credit for doing a job well done. Okay.

THE CLERK: Judge, we also have Assistant Attorney General Kristin Klein Wheaton, who's present on the telephone.

This is the date set for oral argument.

MR. BOYD: Just a correction, Ms. Klein Wheaton is with SUNY counsel's office, she's not an AAG.

THE COURT: Okay.

MR. BOYD: She was going to be present on behalf of the client, but she is sick currently, and so we appreciate the Court accommodating her with the dial-in so she can hear how things go.

THE COURT: Okay. And I'm sorry to hear about the illness, but let me just say, because we have someone listening remotely, that no one is to record or rebroadcast this in any way. That's under penalty of contempt and the sanctions that might go along with it.

Okay. So before we get into the nitty-gritty of the argument, as I understand it, you're bringing three claims for injunctive relief and for damages, right?

MR. STEINBAUGH: Correct.

01:04PM THE COURT: I'm having a tough time wrapping my head around the differences among those three claims. Can you explain to me the difference between the retaliation claim and the Pickering claim just to start?

MR. STEINBAUGH: I think Pickering controls both of those claims. So once -- one of the retaliation claims is for monetary damages, the other is for injunctive relief.

THE COURT: Okay. But really, there's only one theory, right? The theory for money damages and the theory for injunctive relief is the same with respect to all of them, right?

MR. STEINBAUGH: Yes.

THE COURT: And with respect to the prior restraint claim, tell me what the prior restraint is.

MR. STEINBAUGH: Well, it's a restraint on his ability to communicate with an academic community.

So Stephen Kershnar is part of a broader academic community. And while he can speak to people outside of that community, there is a set of people which is very broad that he cannot speak to about any subject.

THE COURT: Right. So that's really not your traditional prior restraint claim, which is -- which would be a restraint from speaking about a certain topic. And, again, I come back to the same thing that I started with: How is that any different than the retail -- I mean, isn't the prior

restraint simply, in your view, part of the penalty that's been imposed for the content of his speech?

MR. STEINBAUGH: That's correct. And in the Pickering balancing application, or the application of the Pickering balancing test to that restriction, the Court can consider the weighty factors involved in why we have a constitutional allergy to prior restraints.

THE COURT: Okay. But you don't think I need to make three different decisions on three different claims; I just make one decision on one general claim, right?

MR. STEINBAUGH: I believe so, yes.

THE COURT: Great. Terrific. Good. Do you disagree with that?

MS. PANTZER: No, Your Honor.

THE COURT: Great, good. Great, terrific. Okay. Go ahead. No one argues from the podium anymore, and I think it's a mistake -- no, no, no, come up, I think it's a mistake. I think -- so I'll tell you, I was an appellate advocate for a whole lot of years, and this is very similar to appellate advocacy. And never in a million years would I not get up and take the podium in court. I think it's much more effective. So I'm glad to see you do it. You're the first person who has done it in my courtroom in maybe three years, maybe since COVID started.

MR. STEINBAUGH: I am used to standing faux pas --

01:07PM THE COURT: Good.

01:07PM MR. STEINBAUGH: -- in that I had the honor of conducting a number marriage ceremonies. And the last one that I conducted, the husband -- or, the father of the bride stopped me in the middle of my speech and said is it okay to if we sit down? Because I'd never told anyone to sit down.

01:07PM THE COURT: Yeah, great.

01:07PM MR. STEINBAUGH: So in any event --

01:07PM THE COURT: So go ahead, the floors is yours.

01:07PM MR. STEINBAUGH: Good afternoon, Your Honor. May it please the Court. My name is Adam Steinbaugh. I'm here, obviously, on behalf of the plaintiff, Stephen Kershnar.

01:07PM Stephen Kershnar is a tendered philosophy professor, and he's been removed from the classroom because people found his thought experiment in a podcast, outside of the classroom, outside of the campus, on his own time, offensive.

01:07PM Under clearly-established law, his speech on extramural podcasts is protected by the First Amendment, and university's willful acquiescence to the fear of heckler's veto is anathema to the free exchange of ideas and prohibited by the 2nd Circuit's decision in Levin. No governmental entity, least of all a university, can choose censorship as the first and only solution to an anti-intellectual outrage on social media.

01:08PM This Court should do two things. First, it should

01:08PM dissolve the ban on contact with the campus community, because
01:08PM that ban is not balanced against any university interest.
01:08PM Second, it should prohibit SUNY Fredonia from using
01:08PM public objections to protected extramural speech as a basis to
01:08PM bar Professor Kershnar from his classroom.
01:08PM THE COURT: Let me ask you this.
01:08PM MR. STEINBAUGH: Sure.
01:08PM THE COURT: Is it your position that a public
01:08PM university can never restrict a professor's speech based on
01:08PM the reaction to that speech?
01:08PM MR. STEINBAUGH: I would look to both Levin and to
01:08PM the 6th Circuit's decision in Bible Believers to guide that
01:08PM analysis. In that under a ticking time bomb scenario, a
01:09PM university could take steps that would limit the speech of a
01:09PM public university professor because that is the only realistic
01:09PM solution.
01:09PM But they need to look for bona fide or bona fide
01:09PM measures to protect the speaker before they resort to
01:09PM censorship. And if they don't consider those measures, then
01:09PM you can't say that the restriction is a narrow remedy to
01:09PM mitigate the interest of the university.
01:09PM THE COURT: Your friends on the other side say that I
01:09PM should consider just the action that took place in February of
01:09PM 2022, and whether it was appropriate then, not whether the
01:09PM continuation of it is appropriate. Are they right?

01:09PM MR. STEINBAUGH: No. I -- the university, for one, made several decisions. This is not just one decision that was continuing, but they were telling Stephen Kershnar that we are continuingly reassessing our analysis to determine whether or not you will be allowed to return to the classroom.

So these are multiple discrete decisions.

THE COURT: So even if they were right in doing what they did, and I'm not asking you to concede that they were, but even if they were right in doing what they did in February 2022, you're still entitled to relief because they're no longer right in August of 2023?

MR. STEINBAUGH: Correct.

THE COURT: Okay. Let me ask you this. What is it that you want right now? I mean, I know that my office reached out to see whether it made sense to argue both this motion for preliminary injunction and the defendant's motion to dismiss at the same time, and you folks balked at that. Why? He doesn't expect to be put back on campus to teach for the fall 2023 term, right?

MR. STEINBAUGH: The university has had a long period to prepare for his return.

THE COURT: I understand. But the fall 2023 term ship has sailed, right?

MR. STEINBAUGH: Even if it has sailed, the Court could consider or could order the university to cease con --

01:11PM or, cease the consideration of the protected extramural speech.

THE COURT: No, I get it. I get it. I get it.

But I'm trying to figure out what the urgent -- and, you know, when we talked last time, I said I thought that this matter had some urgency, but not emergency. And so I fully expected you, everyone, to say yeah, it made sense to argue both things at the same time.

Ou folks said no. I'd like to know why.

What is it? What's -- what is -- is there some magic date? Is there something that I need to know about in terms of why, you know, August 11th is different than August 18th, is different than August 21st, other than ten days of what you say is punishment for speech.

MR. STEINBAUGH: Well, let me take that in two parts.

So the question of the motion for the preliminary injunction and the motion to dismiss, those depend on different records before the Court. And I think the Court only needs to consider the motion for the preliminary injunction today.

THE COURT: Right.

MR. STEINBAUGH: On the question of whether or not relief today for the fall semester is appropriate, I think that it is. But even if the Court doesn't order that today, ordering the university to cease continuing consideration of

01:12PM his extramural speech would allow him to prepare for the coming spring semester.

THE COURT: Sure.

MR. STEINBAUGH: So just recently one of the other philosophy professors in his department, Neil Feit, announced his retirement. And as we've shown in our exhibits, the university has struggled to find faculty members to teach these classes.

So, in the spring semester, even if the Court does not permit Stephen Kershnar to teach this fall, he would start ordinarily preparing for the spring semester in, say, early October. So if the Court orders relief now, that prevents -- or, allows him to prepare for the spring semester. And it also gives the university additional time to take whatever measures they deem necessary in order to mitigate any additional public attention that might come from the Court's order.

THE COURT: Okay. Go ahead.

MR. STEINBAUGH: So, I would start first that Stephen Kershnar's speech is protected by the first amendment. There's no serious argument to the contrary. Whether or not he spoke is an academic or as a public citizen, which I think that we have alleged and shown, because he is -- he's taught to teach, he is not taught to podcast, Fredonia did not ask him to appear on a podcast, it doesn't facilitate his podcast,

and they don't promote any of his podcasts. This is speech that's directed to the public as part of a thought experiment.

And even if the subject matter is part of his expertise, Lane v Franks teaches us that subject matter does not render the speech to be the speech of an employee. So if an employee says, of a police department for example, says to the local reporter, here's a bunch of corruption within my department, this is what I've learned about in my job. The public has an interest in learning about that. And the police officer is not speaking for the department, he's speaking as a citizen to the public.

THE COURT: Let me ask you this. Was he introduced in the podcast as a professor at Fredonia?

MR. STEINBAUGH: I believe the host made reference to that, yes.

THE COURT: Okay. And was there any disclaimer given that his remarks are his remarks, and not Fredonia's remarks?

MR. STEINBAUGH: No.

THE COURT: Okay.

MR. STEINBAUGH: But the Supreme -- I can't recall if it's the Supreme Court, but the notion that a university endorses the speech of a professor I don't think is reasonable. Professors are hired because they are experts. They're speaking on their own.

And if you look to, for example, a state like Florida

01:15PM right now, where the state is attempting to use its employment
01:15PM relationship to tell faculty members that this is how they
01:15PM will speak about matters of race, this is how faculty members
01:15PM in the law school who are serving as expert witnesses these
01:15PM are the positions they can or cannot take, the notion that
01:15PM when a professor speaks on their subject matter or the matter
01:15PM of their expertise, if they're also speaking on behalf of the
01:15PM State or on behalf of their employer, that extends almost
01:15PM unfettered authority to the employer, the university, to limit
01:15PM their speech, and that's a very dangerous tool.
01:15PM Can I -- we have academic freedom for the very
01:15PM purpose of being able to say things that offend the State,
01:15PM that offend students, that offend the public.
01:15PM THE COURT: Okay.
01:15PM MR. STEINBAUGH: So, whether or not Stephen Kershnar
01:16PM spoke as an academic or as a citizen, the -- his speech is
01:16PM analyzed under Levin and under other Pickering cases to
01:16PM determine whether or not the university's interest outweighs
01:16PM his interest in expression.
01:16PM And where the university's interest is in the free
01:16PM exchange of ideas, I don't think that it can. And I would
01:16PM point the Court's attention to Bloom where the 2nd Circuit
01:16PM said that the efficient function of academia, the Court
01:16PM actually depends to a degree on the dissemination in public
01:16PM fora of controversial speech implicating matters of public

01:16PM concern. Free and open debate on issues of public concern is
01:16PM essential to the purpose of higher education.
01:16PM So all of the sources of objections that the
01:16PM university has offered, that's not enough to overcome the
01:16PM interest in the free exchange of ideas, because to do so would
01:16PM impose a heckler's veto. And, here, it's not even a heckler's
01:17PM veto, it's the fear that a heckler's veto might result.
01:17PM THE COURT: And you think that a college professor
01:17PM has a heightened interest in free speech, such that Garcetti
01:17PM doesn't apply, right? That there's a broader protection
01:17PM because of academic freedom, because of the fact that college
01:17PM campuses are supposed to be places where ideas, sometimes
01:17PM controversial ideas, can be exchanged, that there's heightened
01:17PM protection there; is that right?
01:17PM MR. STEINBAUGH: That's exactly right. And that's
01:17PM why the Garcetti Court singled out one, and only one,
01:17PM government employee to say we're not reaching that far. And
01:17PM that's public university professors.
01:17PM THE COURT: Okay.
01:17PM MR. STEINBAUGH: So all of these sources of
01:17PM opposition that the university has cited, all of these are not
01:17PM sufficient to overcome Professor Kershnar's interest in being
01:17PM able to engage in the free exchange of ideas.
01:18PM So, for example, you have some tepid opposition by
01:18PM students. The university's own evidence shows that the --

there was a protest on campus, or a planned protest on campus, but the student newspaper reported that basically nobody turned out. There was not really any student interest here.

THE COURT: Well, if -- so if a lot of students did turn out, and if there was something next week where, you know, lots of students turned out to protest, would that -- would that change --

MR. STEINBAUGH: No.

THE COURT: -- should that change my decision?

MR. STEINBAUGH: No. And that's the question answered by Levin, which is -- in Levin, you had students not only out on campus protesting, you had students protesting in the classroom. You had a melee with the security guard outside the classroom.

And that physical violence on campus was not sufficient to overturn or override Professor Levin's interest in free exchange of ideas. And no doubt, his ideas were offensive to a wide range of students and faculty members and activists, but a professor on a public university campus is going to be able to engage in an exchange of ideas that other people are going to find noxious.

THE COURT: Let me ask you this. They say he can teach online, and they've given him some opportunities to set up online courses, and I guess he hasn't taken that opportunity. Shouldn't that --

01:19PM MR. STEINBAUGH: Well --

01:19PM THE COURT: -- shouldn't that factor into the analysis here?

01:19PM MR. STEINBAUGH: -- let me answer that in two parts.

01:19PM What they did not do is offer that at the outset of the controversy. And he offered to teach online, to say, just as faculty members throughout the pandemic have, I can teach live classes via Zoom. The university never responded to that offer.

01:19PM Now they have since then offered to allow him to teach asynchronous classes online, so it's a class that a student can come home late at night, 3 in the morning, and download the audio. And there's no back and forth, it is not a live class. And that's contrary to the interest in the exchange of ideas in the classroom.

01:20PM THE COURT: If they let him teach an online course that is a realtime online course, is that sufficient?

01:20PM MR. STEINBAUGH: That's better. I think that that would allow -- that would be a -- a mitigating measure that they could take on an interim basis. But I think there's also value in the face-to-face exchange of ideas. So as a temporary measure, certainly if there is a subsequent flare-up of public attention here, could that be an interim measure? I think that would be correct.

01:20PM THE COURT: But that's not what you're asking for

now.

MR. STEINBAUGH: No.

THE COURT: You want him to be able to go back on campus to teach? That's what you want now?

MR. STEINBAUGH: Correct. And if the university needs to come back and say these are the reasons why we can't have him in the classroom right now, why we have to have him teach online, via live classes, that's one thing, and that's certainly something that we can work with the university on.

THE COURT: Okay.

MR. STEINBAUGH: So the other opposition here that we've seen is the university cites opposition by a donor. And in Dube, the 2nd Circuit rejected opposition by government officials by putting pressure on a university and threatening its funding. I think that if a -- government officials are putting pressure on a university with regard to its funding, the university gets much more funding from the government in most cases than from private donors. And academic freedom, if it means anything, must mean that you're going to be able to say something that a donor does not agree with. And whether or not that patron is the State or a private donor makes no difference.

And then the -- the other opposition here comes from social media, it comes from outraged activists. And in Melzer, the Court took as a given that community objection

01:22PM cannot dictate whether employees' constitutional rights are
01:22PM protected because allowing the public with the government's
01:22PM help to shout down unpopular ideas that stir anger is
01:22PM generally not permitted under our juris prudence. And I think
01:22PM if anywhere, that is most important on college campus.
01:22PM We have a illiberal strain running through our
01:22PM society, sort of an anti-intellectual strain, where people had
01:22PM learned that if you are the squeakiest wheel, if you engage in
01:22PM speech that appears intimidating, sort of "if I were king,
01:22PM you'd be first against the wall" sort of speech, they can
01:22PM enlist governments to suppress speech they don't like.
01:22PM And even setting aside Stephen Kershnar, if a
01:23PM professor on a public university campus offends some sect of
01:23PM the dark web, or society, or some political figure, regarding
01:23PM almost any subject, that would imperil -- as the university
01:23PM would then suppress the speech of that professor, that would
01:23PM imperil almost any idea.
01:23PM Even in the emails that the university cites, there's
01:23PM an email from someone saying that LGBTQ people are mentally
01:23PM ill, and I don't think that, for example, a professor who
01:23PM advances ideas on -- about gender and the role of gender in
01:23PM society, or a professor who identifies as LGBTQ, can be
01:23PM removed from the classroom on the basis that someone somewhere
01:23PM believes their speech or their identity to be offensive.
01:24PM So, before speech is censored, the government's

01:24PM obligation is to detect the speech, and in assessing the risk
01:24PM it bears the burden to show that -- disruptions like this.
01:24PM In Locurto, the Court said that the action must serve
01:24PM a reasonable prediction of disruption, and Lewis v Cowen says
01:24PM that that means precisely disruption.
01:24PM So where we are now, today, the -- what the Court has
01:24PM to look to is whether or not the university's belief that if
01:24PM Stephen Kershnar returns to campus, it is likely that violence
01:24PM will result, if that is a reasonable prediction of disruption.
01:24PM I don't think that it is.
01:24PM THE COURT: Well, you're saying more than that,
01:24PM though. You're saying even if violence would result, that
01:24PM still wouldn't necessarily be good enough, because there are
01:24PM measures that they can take to shop that short of having him
01:25PM come. I mean, I think what you're saying is that the
01:25PM heckler's veto can't beat, can't -- can't trump everything
01:25PM with respect to free speech.
01:25PM MR. STEINBAUGH: We don't hand over our
01:25PM constitutional rights to -- on a silver platter to anyone
01:25PM willing to make threats. I don't think that it would be --
01:25PM there is not a -- no scenario in which a university could not
01:25PM take action, but it has to show that the action it's taking is
01:25PM necessary.
01:25PM THE COURT: Yep. Okay. Let me hear from the
01:25PM defense, unless -- wrap up. Wrap up.

01:25PM MR. STEINBAUGH: Well, I am perfectly happy to answer any further questions, but I'm happy to let them go, too.

THE COURT: Terrific. Great.

MR. STEINBAUGH: Thank you.

THE COURT: Now I guess you have to come up, don't you, because I --

MS. PANTZER: I'm coming up.

THE COURT: -- well, after I said what I said. But I really do believe that.

MS. PANTZER: I agree.

THE COURT: I really do believe that.

MR. BOYD: She was going to come up anyway, Your Honor.

MS. PANTZER: I was coming up.

Your Honor, my name is Alyssa Jordan Pantzer. I am an Assistant Attorney General, again, with the Office of the New York State Attorney General. I, along with my cocounsel, Jennifer Kimura, represent the defendants in this case.

Your Honor, AG Kimura and I intend to split the argument. I'm going to address the lack of likelihood of success of the merits as to Garcetti and Pickering, and AG Kimura is prepared to address the absence of likelihood of success on the merits based on Mount Healthy, and she's also prepared to address the remaining preliminary injunction elements, irreparable harm, balancing of the equities. And to

01:26PM 1 the extent the Court would like to hear, AG Kimura is also
01:26PM 2 going to address the qualified immunity defense pursuant to
01:26PM 3 our motion to dismiss.
01:26PM 4 THE COURT: Qualified immunity does not -- doesn't go
01:26PM 5 to the preliminary injunction.
01:26PM 6 MS. PANTZER: No, Your Honor.
01:26PM 7 THE COURT: Yeah, I just want to do -- I mean, again,
01:26PM 8 I just want to do preliminary injunction today.
01:26PM 9 MS. PANTZER: Understood.
01:26PM 10 THE COURT: That's all I want to do.
01:26PM 11 MS. PANTZER: Understood.
01:26PM 12 What we believe this case boils down to, Your Honor,
01:26PM 13 is this. Plaintiff would like this Court to find that there
01:26PM 14 are no limits to any speech that's framed as academic. But
01:27PM 15 that's not what the law says. The law establishes that there
01:27PM 16 is a limit, and that limit largely is Pickering balancing,
01:27PM 17 Your Honor.
01:27PM 18 We have submitted competent evidence by way of Chief
01:27PM 19 Isaacson's declaration to establish that SUNY faced
01:27PM 20 significant security disruptions.
01:27PM 21 THE COURT: But that's not why -- but that's not why
01:27PM 22 he was barred from the campus. Your president said that his
01:27PM 23 speech was despicable, and -- and reprehensible, and used lots
01:27PM 24 of language immediately after the Twitter feed went viral to
01:27PM 25 decry what he said. I mean, that's why he wasn't let back on.

01:27PM MS. PANTZER: No, Your Honor, it was the security disruption.

01:27PM The -- the president did make those statements, absolutely. But the fact of the matter is that the university already knew that Mr. -- Dr. Kershnar held these views. It was published on his university biography. It was widely available to the University President Kolison to know that the plaintiff held these views.

01:28PM Further, I think the Locurto case is directly on point there, Your Honor. In that case Mayor Guiliani spoke about his NYPD firefighters' racist antics and stated they, will be fired, they will be fired. As in, they will be fired essentially for being racist.

01:28PM And even in that case, the Court found, Your Honor, that wasn't enough to establish retaliatory motive. In that case, the Court found that the limit was reasonable because of the potential for disruption to the firefighters in that case.

01:28PM THE COURT: So -- so there was a potential for disruption in February of 2022.

01:28PM MS. PANTZER: Yes.

01:28PM THE COURT: Why is there a potential for disruption in August of 2023? I mean, doesn't there come a point where the potential for disruption goes away?

01:29PM MS. PANTZER: Well, Your Honor, we have repeatedly 0conducted these security assessments. We have done them

01:29PM several times since this situation arose. And in each of those cases, we've found that there still is a security risk. And that evidence is laid out in the declaration of Chief Isaacson. And there is absolutely zero evidence before this Court to rebut what Chief Isaacson has provided.

So we think that this case boils down to plaintiff's arguing that there should just be no limit, even in the face of both actual and potential disruption to the campus.

So I do want to make one initial point. We do interpret local Rule 65 to require an evidentiary hearing prior to the issuance of a preliminary injunction, and -- unless there is a waiver. And so we had noted at our earlier appearance that we believe that this case is ripe for an evidentiary hearing. And --

THE COURT: An evidentiary hearing to determine what?

MS. PANTZER: Well, if there is any question in the Court's mind as to whether or not there is a legitimate security concern here, then we would like to present Chief Isaacson for the Court. We would like to bring him in.

We do believe that if there is a question in the Court's mind, bringing Chief Isaacson in will absolutely resolve that question.

THE COURT: So does this mean -- so does this mean that the heckler's veto is -- trumps everything, because if there is it a legitimate security concern, if there are enough

01:30PM people who don't like someone's speech, they can shut that person up?

MS. PANTZER: Well, no, Your Honor. So -- so, that's not what we have here. Right?

So, we have competent evidence before this Court from Chief Isaacson, a former FBI Special Agent, that he assessed there to be a significant security concern. I don't think we would have that evidence in every case. This is a special circumstance.

THE COURT: I understand that. I understand that. But what I'm saying is in any case where someone says something that is controversial enough, unpopular enough to create a -- a -- an uprising of folks against him, that they can shut that person up.

So, if I can get -- depending on how many people I can get together to, you know, so if somebody on SUNY Fredonia campus says, you know, the Red Sox are the best baseball team, and I'm a Yankee fan, if I can get a whole lot of people together to say gosh, darn it, I don't want that kind of stuff said on -- and we're gonna riot if this guy keeps saying these things on the SUNY Fredonia campus, I can shut them up.

MS. PANTZER: Right, I hear your concern, Your Honor. But I think in this case, under these circumstances, we do have what Chief Isaacson has analyzed to be a significant and legitimate security concern.

01:32PM THE COURT: But tell me where -- tell me where -- tell me where we draw that line. Tell me where -- when do we turn over to the hecklers the ability to shut up a speaker?

How do I determine when that -- so -- so, and your friend conceded that there might be a situation where, you know, a ticking time bomb where something's gonna go off where the university has to do something, it's got no choice. And, so, I understand that.

But what I'm not understanding is where you want me to go. What you're suggesting, I think, is that this can continue forever, as long as there are enough people who are upset enough about the speech that they're willing to threaten violence. And if that's the case, then I think we've now turned over our universities to the hecklers, and they can decide what's taught and what's not taught, what's said and what's not said.

MS. PANTZER: We will continue to balance the security risk, Your Honor. And --

THE COURT: What does that mean?

MS. PANTZER: Pickering balancing requires us to assess the First Amendment value of the speech versus the potential for actual disruption to the campus community.

THE COURT: Okay. And what's the First Amendment value of the speech --

MS. PANTZER: Well --

01:33PM THE COURT: -- here?

01:33PM MS. PANTZER: -- the First Amendment value of the speech, Your Honor, you know, it's our contention that the -- the security -- the both potential and actual disruption here outweighs the secure -- the First Amendment value of the speech here.

01:33PM THE COURT: So tell me what the First Amendment value of the speech -- how do you view the First Amendment value of the speech?

01:34PM MS. PANTZER: Well, we have to assess it under Pickering.

01:34PM THE COURT: And, so, assess it for me.

01:34PM MS. PANTZER: Well, initially, you have to assess whether or not it is a matter of public concern, right? The speech. So, that is the first step of the Pickering analysis.

01:34PM THE COURT: Okay.

01:34PM MS. PANTZER: So here, what happened was essentially the speech was asking the audience of the podcast to imagine an adult male having sex with a 12-year-old girl. That is, you know, that is essentially espousing or declining to immoralize pedophilia, Your Honor. And it's our contention that that is not a matter of public concern.

01:34PM THE COURT: So you're telling me that the content of the speech, whether you agree with the person's pos -- so, if someone said -- well, what if I said that sex between an adult

and a child is wrong under any circumstances; would I be speaking on a matter of public concern?

MS. PANTZER: Yes.

THE COURT: But if I say it's not wrong under any circumstances, I'm not speaking on a matter of public concern?

MS. PANTZER: No, I don't think that's the argument.

The argument, Your Honor, is that -- listen, we acknowledge that whether or not it's a matter of public concern is a sticky subject. Right? The Melzer --

THE COURT: I don't think it's a close question. I honestly don't think it's a close question.

I don't know how -- I mean, you just told me that if I said that an adult having sex with a child under any circumstances is absolutely wrong under any circumstances, that's a matter of public concern. And I don't see how you could argue any other way.

But I don't see how you can say that the opposite of that is not true. Because the topic is what's the matter of public concern, not the position that you take on it. Otherwise, we'd go down a road that is -- if -- if I agree with the speech, it's protected; if I don't agree with the speech, it's not protected. And we know that's not the law.

MS. PANTZER: No. No. We absolutely don't advocate for that rule, Your Honor. But look -- we're looking -- so whether or not it's a matter of public concern, the test is

01:36PM newsworthiness. So the topic of whether or not pedophilia should be considered immoral, that is not newsworthy.

THE COURT: It went ballistic.

MS. PANTZER: Right.

THE COURT: It went crazy.

MS. PANTZER: I understand.

THE COURT: That's not news? Isn't that by definition newsworthy?

MS. PANTZER: No. I don't think the public's reaction determines whether or not the speech is newsworthy, Your Honor. A visceral reaction in anger to what was being said does not necessarily require a finding of newsworthiness. What was newsworthy here was that SUNY Fredonia was employing someone who the public could, you know, construe as being a supporter of pedophilia. That was -- not the underlying content, questioning whether it should be deemed immoral to have -- for an adult male to have sex with a 12-year-old girl, or demanding that the audience consider incestuous sex between a grandmother and a 1-year-old baby. That was not newsworthy.

So, in moving on from --

THE COURT: Not newsworthy because of the reprehensibility of what he's saying?

MS. PANTZER: Because it is largely and widely accepted that -- that pedophilia is immoral, Your Honor. And what was newsworthy here, what was the public concern was,

01:37PM frankly, SUNY Fredonia's employment of someone who appeared to
01:37PM be a pedophilia -- a pedophile sympathizer.
01:37PM THE COURT: Boy, I tell you, I think that it's
01:37PM circular, and you keep coming back to the content of the
01:37PM speech as -- and the position that he takes on an issue that I
01:37PM think you've conceded is a matter of public concern, takes --
01:37PM takes a position on that issue. That makes it -- that makes
01:37PM it not a matter of public concern. And, that to, me is just
01:38PM circular.
01:38PM MS. PANTZER: No. I, first of all, I haven't
01:38PM conceded that it was a matter of public concern, Your Honor.
01:38PM What I'm saying --
01:38PM THE COURT: When I asked you -- well, when I asked
01:38PM you if I said that speech -- if I said that sex between an
01:38PM adult and a child under any circumstances is wrong, you said
01:38PM that's a matter of public concern. I think that's a
01:38PM concession.
01:38PM MS. PANTZER: No. I'm sorry, Your Honor. What I
01:38PM meant to -- I thought what you were indicating was whether or
01:38PM not age of consent laws, their variability across states.
01:38PM Whether or not a 17-year-old versus a 16-year-old should be
01:38PM able to consent. Certainly, those are matters of public
01:38PM concern. Sex, even, Your Honor, is a matter of public
01:38PM concern.
01:38PM THE COURT: Okay. So 17 versus 14 is a public matter

01:38PM of public concern?

MS. PANTZER: Maybe. Maybe, Your Honor.

THE COURT: Okay. So where do you want me to draw that line? 17 versus 14? 17 versus 16 is okay, right? That -- you would have to concede that? That that's a matter of public concern.

MS. PANTZER: Your Honor, this was not that. This was not that. This was, imagine an adult male having sex with a 12-year-old girl. Imagine a grandmother fellating her baby grandson. That's what this was.

THE COURT: So if he said imagine a 19-year-old boy having sex with a 17-year-old girl, that's a different story?

MS. PANTZER: Maybe, Your Honor.

THE COURT: Okay. How about a 23-year-old male and a 16-year-old girl?

MS. PANTZER: Maybe, Your Honor.

THE COURT: Where do you want to cross the line? Where do you want to draw that line?

MS. PANTZER: I think the distinction is in, you know, what we have described in our papers.

And, again, we acknowledge, Your Honor, that public concern is a sticky subject. The Melzer Court in the 2nd Circuit declined to deal with it, essentially. The Melzer Court moved on. It said assuming arguendo that this is a matter of the public concern, it doesn't matter because we

still have actual and potential disruption under Pickering. And again --

THE COURT: So let's agree to do that now. Assuming it's a matter of public concern --

MS. PANTZER: Well, so, then we move on to Pickering balancing, which again, I think that the predominant point here, Your Honor, is that we have submitted evidence, competent evidence to the Court in the form of Chief Isaacson's declaration establishing both actual and potential disruption, and there's no evidence beyond speculation and conjecture to counter that. And --

THE COURT: And that's all you -- and that's all you need?

MS. PANTZER: Yes, Your Honor. We've -- we've submitted the evidence of the actual and potential disruption to the campus. That's what we need.

THE COURT: So whenever there's -- whenever there's potential disruption, a speaker can be silenced?

MS. PANTZER: Yes.

THE COURT: Okay.

MS. PANTZER: And the Levin case that is heavily relied upon both during oral argument and in the papers is distinguishable, because the Levin case predates the Waters decision, which held that the Court can consider both actual and potential disruption.

01:41PM Levin Court was only considering actual disruption.

01:41PM This Court, postdating -- this -- this case and this Court after Waters is allowed to consider both.

01:41PM And we submit that we have provided evidence of both, Your Honor.

01:41PM Unless the Court has any further questions, I will yield to my colleague as to the remaining elements of our defense.

01:41PM THE COURT: Yep.

01:41PM MS. KIMURA: Good job.

01:41PM Your Honor, before I get into the brunt of my portion, I'd like to just briefly address the heckler's veto that my colleague I think was attempting to distinguish.

01:41PM This case is similar to the Melzer case as it relates to the heckler's veto. That Court did say it wasn't a heckler's veto because students aren't hecklers, they are participants of the school and the public education. And similarly here, the students and alumni were also not hecklers as they were not outsiders.

01:42PM THE COURT: But, so, well, we don't need to call them hecklers. But you're saying that students have the ability or alumni have the ability to silence professors on a public campus regardless of what the message is?

01:42PM MS. KIMURA: I think that we need to look at the fact that the actual and potential disruption is not necessarily

01:42PM dealing with the students. I mean, there's other cases where
01:42PM students didn't even complain about what was going on.
01:42PM I do believe that in the Vega v Miller case, students
01:42PM did not complain regarding this clustering exercise where
01:42PM students were screaming out obscenities, like, you're so hard,
01:42PM or sex -- sex terms. There was no disruption. There's no
01:42PM complaints coming from the students. And yet still, the Court
01:43PM found that the firing of the teacher, the professor, was
01:43PM lawful.
01:43PM THE COURT: Well, sure. But the point -- the
01:43PM question I'm asking is, so suppose -- suppose the professor
01:43PM says I think that sex between anyone over the age of 18 and
01:43PM anyone under the age of 18 is wrong under all circumstances
01:43PM and should be criminalized. And there's a whole bunch of
01:43PM 19-year-old boys on the campus who say, holy cow, that better
01:43PM not be the case. We don't like that at all.
01:43PM So they start, you know, shouting down this professor
01:43PM and threatening violence and all that.
01:43PM MS. KIMURA: I think in that matter, Your Honor, if
01:43PM there was actual and potential disruption, I think that the
01:43PM Court would be able to terminate that teacher as it relates to
01:44PM Pickering.
01:44PM THE COURT: What do you mean, terminate the teacher?
01:44PM MS. KIMURA: Terminate the teacher or the professor.
01:44PM THE COURT: Fire him?

01:44PM MS. KIMURA: Yeah.

01:44PM THE COURT: He can be fired because the students --

01:44PM MS. KIMURA: If the -- if the college campus wanted to do so, and take discipline. But that's not what happened in this matter, Your Honor.

01:44PM THE COURT: So you're giving the students effectively -- you're giving groups of students effectively the power to silence speakers, depending on whether they like what they say or what they don't like.

01:44PM MS. KIMURA: I do not agree with that statement, Your Honor.

01:44PM THE COURT: Well, I just gave you -- so tell me why my example is wrong. Tell me what about my -- so you've got a teacher who says I think that sex between a boy who's 18 years old and 3 days, and a woman who is 18 years old less 5 days, so 17 years old and 360 days, is -- should be illegal, should be criminalized. And you've got a lot of 18-year-old and 19-year-old boys, freshmen and sophomores on your college campus that say BS, you know, that's got to be wrong, and they start, you know, mobilizing, and having protests, and shouting down this professor whenever he speaks on campus and threatening violence against him.

01:45PM MS. KIMURA: I think --

01:45PM THE COURT: They've effectively shut him up, right?

01:45PM And you say that the university can then say, you

01:45PM know what? He's gone.

MS. KIMURA: Well, I'm saying that as it relates to the disruption, that would disrupt the internal operations of the campus, Your Honor. It's not about the speech, per se, in your example, it's about what would happen thereafter in the aftermath that disrupts the operation, in which the college campuses are entitled to pursue disciplinary actions if they wanted.

THE COURT: Okay.

MS. KIMURA: Your Honor, I have to address retaliation. The plaintiff has not overcome the but-for under the Mount Healthy standard. The law says that the plaintiff must prove that the speech was a substantial or motivating factor in the alleged adverse employment action. However, there is no liability if the defendant can show that they have taken the same -- if they would have taken the same adverse action in the presence or the absence of the protected speech.

Plaintiff being reflected to be physically off campus was never about the contents of the speech. As we articulated in our papers, defendants have long known about the content of the plaintiff, the curriculum that he teaches. His CV is on SUNY Fredonia's website. He has published by book entitled Adult-Child Sex in 2015. He's gone on numerous podcasts prior to this incident talking about these controversial topics.

THE COURT: Yeah, but the first time it was

01:46PM disseminated widely was this podcast, right?

01:47PM MS. KIMURA: I don't know, Your Honor. This is the first time -- I don't know how frequently. But I think with respect to the bringing of that podcast, that's the portion that did go viral. And but the campus has known about -- the defendants have known about this topic area, and they never acted to discipline him as it relates to this. They know that this is his curriculum.

01:47PM THE COURT: Doesn't the fact that your president said the things that he said about the speech cut directly against what you're saying?

01:47PM MS. KIMURA: I disagree, Your Honor. That is very similar to what my cocounsel had mentioned regarding the Locurto v Guiliani matter, where Mayor Guiliani did come out explicitly and say I'm going to fire these guys. And in that -- and that Court upheld the termination because of the disruption, and the idea that the reasoning behind it was that they didn't want to let New Yorkers think that the FDNY and the NYPD were racist.

01:48PM THE COURT: Okay.

01:48PM MS. KIMURA: So, Your Honor, it was never about the content of the speech, it was regarding -- what had happened was dealing with the actual and potential disruption that occurred.

01:48PM Plaintiff failed under Pickering. Defendant, in our

01:48PM opinion, could have terminated plaintiff permissibly. And
01:48PM I -- as it relates similarly to the Locurto case.
01:48PM Also, as in the Melzer case, they upheld the
01:48PM termination of that teacher. The school board knew about his
01:48PM association, the teachers association of the North American
01:48PM Man-Boy Love Association, also known as NAMBLA. The Court
01:48PM acknowledged that he had a First Amendment right to that
01:48PM association, but still upheld that termination.
01:48PM Plaintiff was never disciplined in this matter. He
01:48PM was never terminated, but he could have been under that
01:48PM Pickering standard.
01:48PM THE COURT: He was never disciplined? He can't come
01:49PM on campus.
01:49PM MS. KIMURA: Your Honor, that's a physical bar. He
01:49PM still is receiving his full salary. He's still able to speak
01:49PM freely if he wants to go on podcasts, which I -- he has --
01:49PM THE COURT: He can't speak with students.
01:49PM MS. KIMURA: I -- that's according to the letter.
01:49PM THE COURT: Yeah. Can't speak with students. Can't
01:49PM come on campus. That seems to me to be -- certainly, he's
01:49PM been restricted in what he can do vis a vis the university
01:49PM where he's employed. So if they pay his salary, but he can't
01:49PM teach, can't speak, can't talk to students --
01:49PM MS. KIMURA: Well, Your Honor, that goes to sort of
01:49PM what we were talking about, you were talking about earlier.

01:49PM The university did give him opportunities to develop these online courses, and he failed to do so in a timely manner. And yet, it's my understanding, that he has not finished those courses.

THE COURT: Why should he have to jump through the university's hoops to teach online courses? Why can't -- why couldn't the university simply say we will allow you to teach what you teach online, and our IT people will do everything we need to do in order to allow you to do that?

MS. KIMURA: Your Honor, I don't -- it's not relating to an IT issue, Your Honor. Any new -- any professor who wants to teach online has to go through this process. It has to develop through SUNY's rubric, not just SUNY Fredonia's rubric, has to go through this process to develop and build their course. That's provided by the evidence that's provided by Lisa Melohusky.

Your Honor, I do want to point out the fact that the plaintiff has delayed this preliminary injunction for 16 months after he was placed off campus. This legal remedy is meant to be -- a preliminary injunction is meant to be used for emergencies. It's supposed to be speedy. It's supposed to be swift. Instead, he has waited. The Courts have denied --

THE COURT: But there comes a point -- I mean, so, again, your friend on the other side said that there's, you

01:51PM know, when there's a ticking time bomb, and there's a reason to take action, you take the action.

And then a month goes by, two months go by, ten months go by, 19 months go by, and -- if my math is correct, and -- and, you know, the ticking time bomb isn't still ticking, and/or at least in their view, so now let's pull the trigger -- not to mix a metaphor, I guess, and let's bring this action for a preliminary injunction now. What's wrong with that?

MS. KIMURA: Your Honor, I think waiting for so long truly undercuts his irreparable harm. He could --

THE COURT: So he can never bring one now?

MS. KIMURA: No, Your Honor.

THE COURT: So five years from now -- five years from now, if he's still in the same place he is that -- the same place five years from now as he is today, he can't bring a preliminary injunction case then?

MS. KIMURA: I think that he could bring a preliminary injunction on his own at any time, but courts have denied preliminary injunction for lesser times, 15 months.

Courts have denied -- when they didn't file -- the -- the Upstate Jobs Party v Kosinski denied a preliminary injunction because they said you could have filed this over two years ago. So he could have brought this, but I do believe that him waiting for so long undercuts his alleged

01:52PM irreparable harm.

THE COURT: So explain to me then why he can bring one five years from now.

MS. KIMURA: I --

THE COURT: I mean, you're gonna make -- you're going to have even a stronger argument five years from now.

MS. KIMURA: Well, I don't think that he would be -- I think he could just bring a complaint, Your Honor. He could bring an action if he wanted, but I think a preliminary injunction is meant to be swift, and there is no need for this.

THE COURT: Okay.

MS. KIMURA: Plaintiff has no irreparable harm and has not established a burden of proof. As I said, he was being paid, he was offered alternative assignment, and was offered to develop online courses which he failed to do so.

And then he also continued to go on podcasts to deliver his speech.

He has not been disciplined, and cannot and will not be disciplined.

Plaintiff cites Levin throughout his papers, Your Honor, and in that situation the Court did deny the preliminary injunction because Levin did not show real imminent, not remote, and irreparable harm.

Then as it relates to the balancing of equities,

01:53PM Your Honor, we do believe that it tips sharply in defendant's
01:53PM favor. We do understand that President Kolison wrote those
01:53PM statements after the disruption ensued, but he wrote that to
01:53PM quell what was going on, to squash what was going on within
01:53PM the disruption. Students are on campus, there are minor
01:53PM children on campus. We've submitted that evidence in our
01:54PM papers. The administration -- there's usually around 3,200
01:54PM students --
01:54PM THE COURT: How do I factor -- how do I factor
01:54PM academic freedom into the balance of the equities?
01:54PM MS. KIMURA: I think that we need to look at the
01:54PM Pickering balancing when it comes to academic freedom, and --
01:54PM since Waters v Churchill said that we just need to show
01:54PM potential disruption we've satisfied the burden.
01:54PM THE COURT: Boy, I'll tell you, I think that your
01:54PM argument leads to frightening possibilities on college
01:54PM campuses.
01:54PM I think that your argument leads to what being taught
01:54PM on college campuses, limited to what students want, or
01:54PM students demand, or what is popular, what is -- and that ideas
01:54PM that are out of the mainstream and that are dangerous and that
01:55PM are exactly the sort of things that our colleges and
01:55PM universities have been teaching for years and years and years
01:55PM just won't get taught. And so, and so everything goes
01:55PM along -- it's Big Brother sort of stuff.

01:55PM It's everything goes along in this homogenous, you know, parochial mindset that no one can challenge, because as soon as someone challenges it, you can get shot down, and shut down.

MS. KIMURA: Your Honor, I have to say that it's -- in this case, it's not about the content, Your Honor. The plaintiff was allowed to teach these matters throughout his entire -- he was even, in his own terms, he rose to the highest SUNY status, which is distinguished teaching professor all the while doing that. He has been able to teach his controversial topics.

THE COURT: Until there was an uproar, and then he couldn't. And then he couldn't.

MS. KIMURA: Potential disruption is our burden. Actual disruption did occur as well, Your Honor, and that is persuasive.

THE COURT: And, again, that means that whenever there's potential or actual disruption, the disruptors can silence the speaker on college campuses where academic freedom ought to be king, as far as I'm concerned.

MS. KIMURA: I would argue that the significant safety concerns outweigh --

THE COURT: I understand. I understand. I understand the argument.

MS. KIMURA: Okay.

01:56PM THE COURT: I'm just saying it leads to, I think, some very dangerous things for our colleges and universities. I mean, that's not to -- I'm not going to decide this today, obviously, I'm going to reserve on this. But that is a concern that I have. And whether that meshes with the law, I'll have to decide. But, and I'll decide it based on the law, obviously.

The -- the -- the -- the concern I have about academic freedom is real, and I think your argument leads to some -- some pretty scary consequences in academia.

Okay. Anything else?

MS. KIMURA: Thank you, Your Honor. If you have any other questions --

THE COURT: No, that's all.

Counsel?

MR. CORN-REVERE: Thank you, Your Honor. I'll be brief.

I just wanted to address a couple of the points that came up in the course of the argument. First is whether or not an evidentiary hearing is needed.

Here, I think it's pretty obvious that the showing that the university has tried to make is -- doesn't satisfy the test under Levin where you have in the face of actual disruption on campus students disrupting classes, actual death threats, and a series of other things that went on for an

01:58PM extended period.

THE COURT: How do we know if he comes back on campus that that's not going to happen? How do we know without a hearing that -- that what they're saying is not going to happen? That -- that, so -- so he goes back, I issue an injunction and allow him to go back on campus, and, you know, he gets beat up, or there are riots or, you know, whatever happens, happens, and I now have egg on my face.

Why shouldn't we have a hearing before that?

MR. CORN-REVERE: Well, again, I think under the law, the obligation is to protect the speaker first. And it's clear from this record, even on the face of the Isaacson declaration, that the campus never considered any alternative short of censoring the speaker.

If you look at paragraph 31, for example, of the Isaacson declaration where he says preventing the first step in the pathway to violence, i.e., creation of the grievance, is the best and only way we can mitigate the safety threats to our campus which result from the Kershnar matter.

In other words, censorship is the only answer that was ever considered by Chief Isaacson and by President Kolison, and they have enforced it throughout this entire time.

THE COURT: Stop there. Stop there.

Is that true?

01:59PM MS. PANTZER: I'm sorry, Your Honor?

01:59PM THE COURT: Is that true, what he just said?

01:59PM MS. PANTZER: That that was the only option considered?

01:59PM THE COURT: Yeah.

01:59PM MS. PANTZER: I was just looking for the paragraph where we -- where Chief Isaacson stated that it would be prohibitively cost -- cost -- you know, financially, for the university to develop the type of police force that would be necessary to quell the violence that is possible from what we've analyzed here.

01:59PM THE COURT: Okay. Why isn't that good enough?

01:59PM MR. CORN-REVERE: Because Chief Isaacson was saying if you're trying to provide protection against every conceivable threat in the world, as opposed to what we have on this record, and on the face of the Chief Isaacson's declaration he makes clear what facts he was relying on, in all of his assessments after the February 2nd assessment, he acknowledged that the level of interest had waned, that people were not filing comments. He suggests that they would come back if Professor Kershnar were to return to campus, provides zero basis and zero --

02:00PM THE COURT: Why isn't the safest thing to do is get him in here and you cross-examine him?

02:00PM MR. CORN-REVERE: We would welcome that opportunity,

Your Honor, but I don't think it's necessary.

THE COURT: Okay. I hear you.

MR. CORN-REVERE: Right. And so for that reason, I think it's not necessary for an attorney hearing, and that under the -- under Levin and under Bible Believers, the obligation to protect the speaker and to the minimize the measures being undertaken comes first.

That leads us to the question of what do we want now. You had a brief conversation with my colleague about that, and I think there are two things.

The first is to issue an injunction dissolving the no-contact order. That's easy, doesn't take any preparation. The university can do that today.

The second is to allow Professor Kershnar to return to classes and to teach at the earliest practical time. Now it may be that as a practical matter he would not be back in the classroom teaching his own classes until next semester, but I don't know that that's true.

You know, they have announced classes, they've had a hard time finding people to fill. Also, during the course of any semester, substitutes are needed from time to time. If -- Professor Kershnar is entitled to rejoin the community of scholars, as he has a right to do, then he could perform those functions, and then get back into the classroom at the earliest practicable time.

02:01PM THE COURT: What about dissolving the no-contact order? Why should that not be something, especially in light of what you folks are saying with respect to disruption being the key, why -- why shouldn't he be allowed to talk to students?

02:02PM MR. BOYD: Your Honor, I'll address that briefly, if you'll allow me.

02:02PM So I think SUNY is prepared to dissolve the no-contact order as to other faculty at this point. They -- our understanding is that Professor Kershnar has been talking to colleagues in the past, they haven't enforced the so-called no-contact order, and they are prepared at this point to not enforce it as to his communications with his colleagues.

02:02PM You know, the primary goal when that was issued was to keep him physically off campus. I understand that the letter certainly also said that he couldn't communicate, and at this point in time, I agree with Your Honor, and that's why our client is prepared to lift it at this point as to his colleagues.

02:02PM THE COURT: What about students?

02:02PM MR. BOYD: The university still has concerns, given what occurred here, and given the very real concerns that a large portion of the student community had with allowing him affirmatively to reach out to students at this point in time. And again --

02:03PM THE COURT: Why? Why? Tell me -- tell me how
02:03PM that -- you know, I understand how his presence on campus
02:03PM might result in disruption conceivably, but I don't understand
02:03PM how contacting students might, as well.
02:03PM MR. BOYD: I believe the thought process is that some
02:03PM of those communications may get out, may make it into the
02:03PM media and social media, and that that may reignite the up --
02:03PM sort of uproar that we saw in February. That's my
02:03PM understanding of what the nature of the concern is. I'm sure
02:03PM Chief Isaacson could explain that better. I'm not a security
02:03PM expert, he is.
02:03PM THE COURT: Okay. Go ahead.
02:03PM MR. CORN-REVERE: Well, it is nice to hear that the
02:03PM university is willing to concede something after 18 months,
02:03PM but up to now, before receiving some skeptical questioning
02:03PM from the Court, they have refused to budge, and they have
02:04PM strung Professor Kershnar along this whole time necessitating
02:04PM this hearing.
02:04PM As I was saying, the two things that we wanted was
02:04PM resolving the no-contact order and to return him to campus at
02:04PM the earliest possible time.
02:04PM Bottom line, this case is about a campus that
02:04PM panicked in response to an ephemeral Twitter mob. And as
02:04PM Your Honor has pointed out, the consequences for higher
02:04PM education, if that becomes the standard, are grave, and we may

02:04PM as well close down universities.

02:04PM We have read continuing references, both in the
02:04PM briefs filed by the State and in the affidavits being filed,
02:04PM that sort of broadly intimate that in some way Professor
02:04PM Kershnar is unsavory, and it's unsafe to have him around
02:04PM students. And the very thought of evening raising moral
02:04PM questions as a philosopher is going to get you branded as a
02:04PM pedophile. Those kinds of insinuations are unworthy, and they
02:05PM have no place here.

02:05PM And this is, by the way, exactly what philosophers
02:05PM do, they raise these kinds of moral questions. And if --

02:05PM THE COURT: Yeah, I get that. I've ready the papers,
02:05PM and I certainly get that. And --

02:05PM MR. CORN-REVERE: Right.

02:05PM THE COURT: -- and especially in a case like this,
02:05PM you know, as Mr. Covert can tell you, I deal with child
02:05PM pornography cases on a pretty regular basis, and I'm not known
02:05PM as a judge who is lenient on those cases at all.

02:05PM So my views, I think, on those sorts of things are
02:05PM pretty well known.

02:05PM On the other hand, the fact that I may disagree with
02:05PM what the professor said sort of heightens my focus on the
02:05PM First Amendment issue here, because that's what's important,
02:05PM not my agreement or disagreement with what he said.

02:05PM MR. CORN-REVERE: That's right. Which is the very

purpose of the First Amendment, and the purpose of universities; to allow people to explore these questions, and to push back against ideas that they strongly disagree with.

THE COURT: Okay.

MR. CORN-REVERE: Thank you.

THE COURT: Got it. Thank you. Anything further?

MS. PANTZER: No, Your Honor, not at this time.

THE COURT: I'll reserve decision. We'll get something out in relatively short order, and if I think I need a hearing, we'll schedule that in relatively short order.

Thank you very much.

ALL PARTIES: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 2:06 p.m.)

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CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Western District of New York on August 11, 2023.

s/ Ann M. Sawyer
Ann M. Sawyer, FCRR, RPR, CRR
Official Court Reporter
U.S.D.C., W.D.N.Y.